STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 13, 2011
v	No. 297692 Wayne Circuit Court
MICHAEL EUGENE CHILDS, Defendant-Appellant.	LC No. 09-027558-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 297763 Wayne Circuit Court
NICO DEMETRIUS THOMAS, Defendant-Appellant.	LC No. 09-027558-FC

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Following a joint jury trial, defendant Michael Childs was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and defendant Nico Thomas was convicted of assault with intent to commit murder, MCL 750.83, and felony-firearm. Defendant Childs was sentenced to 25 to 50 years' imprisonment for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant Thomas was sentenced to 12 to 20 years' imprisonment for his assault conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant Childs now appeals as of right in Docket No. 297692, and defendant Thomas appeals as of right in Docket No. 297763. We affirm in both appeals.

Defendants' convictions arise from a neighborhood altercation that took place in the late afternoon of August 31, 2009, on East Euclid Street in Detroit. Defendant Childs's convictions relate to the shooting death of Clinton Lewis, and defendant Thomas's convictions relate to the

nonfatal shooting of Tavaras Montgomery. There were numerous witnesses to both shooting incidents.

I. DOCKET NO. 297692

A. AUTOPSY REPORT

Childs first contends that the introduction of autopsy report results through a medical examiner who did not perform the autopsy violated his constitutional right of confrontation and the rules of evidence. These assertions of error are unpreserved because Childs did not object on any basis during the testimony of forensic examiner Dr. Cheryl Loewe. Therefore, we review these matters only to determine whether there was plain error that affected Childs's substantial rights and, if indeed plain error affecting substantial rights is shown, whether the error resulted in the conviction of an actually innocent Childs or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of Childs's innocence. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Lewis (On Remand)*, 287 Mich App 356, 359; 788 NW2d 461 (2010).

In *Lewis*, *id.* at 359-360, this Court explained:

> The Confrontation Clause provides: "(i)n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Am VI. Our state constitution also guarantees the same right. Const 1963, art 1, § 20. To preserve this right, testimonial hearsay is inadmissible against a criminal defendant unless the declarant was unavailable at trial and there was a prior opportunity for cross-examination of the declarant.

In *Crawford v Washington*, 541 US 36, 51-52; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court offered the following guidance for discerning whether a statement qualifies as being "testimonial:"

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v Illinois*, 502 US 346, 365[; 112 S Ct 736; 116 L Ed 2d 848] (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3.

See also *People v Fackelman*, 489 Mich 515; ___ NW2d ___ (2011).

In *Lewis*, this Court examined a defendant's right of confrontation in the context of a trial court's admission of an "autopsy report prepared by two nontestifying medical examiners

through the testimony of a third medical examiner from the same laboratory, Dr. Carl Schmidt." *Lewis*, 287 Mich App at 359. In a prior opinion, this Court concluded that the autopsy report was nontestimonial because it was not prepared in anticipation of litigation against the defendant, but rather pursuant to a duty imposed by law, and thus was admissible under MRE 803(8). *Id.* at 360. The panel previously "noted that a medical examiner is required by statute to investigate the cause and manner of death of an individual under certain circumstances, including death by violence, MCL 52.202(1)(a), and thus further concluded that the admission of the autopsy report through Dr. Schmidt's testimony did not violate defendant's Sixth Amendment rights[.]" *Id.*

However, the Michigan Supreme Court remanded the case to this Court to reconsider the defendant's Confrontation Clause argument in light of" *Melendez-Diaz v Massachusetts*, ___ US ___; 129 S Ct 2527; 174 L Ed 2d 314 (2009), a case that Childs maintains mandates reversal of his convictions in this case. *Lewis*, 287 Mich App at 358, 361. As summarized by this Court in *Lewis* on remand:

> That case [*Melendez-Diaz*] involved the use of affidavits by forensic analysts to support the defendant's convictions of distributing and trafficking in cocaine. ___ US at ___; 129 S Ct at 2530-2531; 174 L Ed 2d at 319-321. At trial, over the defendant's objection, the court admitted three notarized "certificates of analysis" from nontestifying laboratory analysts who, at the request of the police, tested the substance in bags seized by the police. *Id.* The certificates stated that chemical testing identified the substance in bags as cocaine. *Id.* . . .
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> On appeal, the defendant in *Melendez-Diaz*, ___ US at ___; 129 S Ct at 2531; 174 L Ed 2d at 320, challenged the admission of the certificates and claimed that the analysts were required to testify in person. The United States Supreme Court reversed the defendant's convictions, holding that the admission of the documents violated the Confrontation Clause. . . .
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> * * *
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> The Supreme Court concluded in *Melendez-Diaz* that the "certificates of analysis" were affidavits, and that they were statements offered against the defendant to prove a contested fact. ___ US at ___; 129 S Ct at 2532; 174 L Ed 2d at 321. As such, the certificates were testimonial in nature and subject to the Confrontation Clause. *Id.* The fact that the "sole purpose" of the certificates was to serve as prima facie evidence at trial further supported the Court's conclusion that they were testimonial. *Id.* [*Lewis*, 287 Mich App at 361-362.]

This Court distinguished the characteristics of the forensic analysis certificates introduced in *Melendez-Diaz* from the autopsy report that formed the basis for Dr. Schmidt's testimony at defendant Lewis's trial, explaining:

> Unlike the certificates, which were prepared for the "sole purpose" of providing "prima facie evidence" against the defendant at trial, *Melendez-Diaz*, ___ US at ___; 129 S Ct at 2532; 174 L Ed 2d at 321, the autopsy report was

prepared pursuant to a duty imposed by statute. *Lewis*, unpub op at 4-5; MRE 803(8); MCL 52.202(1)(a). As we stated in our previous opinion:

> "(W)hile it was conceivable that the autopsy report would become part of (a) criminal prosecution, investigations by medical examiners are required by Michigan statute under certain circumstances regardless of whether criminal prosecution is contemplated." (*Lewis*, unpub op at 4).
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> Furthermore, unlike the way the certificates in *Melendez-Diaz* were used, Dr. Schmidt formed independent opinions based on objective information in the autopsy report and his opinions were subject to cross-examination. Because the autopsy report was not prepared primarily for use in a later criminal prosecution and defendant cross-examined Dr. Schmidt regarding his independent opinions based on the autopsy report, the report is not testimonial evidence and defendant was not denied the right to be confronted by the two nontestifying medical examiners who prepared it. [*Lewis*, 287 Mich App at 362-363 (some citations omitted).]

In this case, Dr. Loewe, a deputy chief Wayne County medical examiner, testified to the cause of death of Clinton Lewis on the basis of an autopsy report prepared by Chief Medical Examiner Dr. Carl Schmidt. In brief testimony, Dr. Loewe characterized Lewis's death as a homicide caused by "[a] single gun shot wound to the chest." Dr. Loewe related that the lone gunshot had entered Lewis "near the arm pit on the right side of the body," damaged Lewis's right lung, his aorta, "[t]he right atrium of the heart," and "the upper lobe of the left lung," before exiting Lewis's body in the area of his "left upper chest." Dr. Loewe's testimony reveals that, as in *Lewis*, 287 Mich App at 363, she utilized Dr. Schmidt's autopsy report to "form[] independent opinions," which Childs's counsel subjected to cross-examination. Similar to this Court's reasoning in *Lewis*, 287 Mich App at 363,

> [b]ecause the autopsy report was not prepared primarily for use in a later criminal prosecution and [Childs's counsel] cross-examined Dr. [Loewe] regarding h[er] independent opinions based on the autopsy report, the report is not testimonial evidence and [Childs] was not denied the right to be confronted by the . . . nontestifying medical examiner[] who prepared it.

Moreover, the *Lewis* Court's emphasis of the harmless nature of the autopsy report's admission in that case applies equally here. As in *Lewis*, "the admission of the report through the testimony of Dr. Schmidt was not outcome determinative: There is no dispute that a crime was committed, and the autopsy did not aid in establishing the identity of the perpetrator, which was the central issue in this case." *Lewis*, 287 Mich App at 363 (internal quotation and citation omitted).

Concerning Childs's suggestion that the report of Lewis's autopsy consisted of inadmissible hearsay, we find that the report qualifies as an exception to the hearsay rule under MRE 803(8), which provides that the following statements are not excluded by the hearsay rule, even though the declarant is available as a witness:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel . . . .

MCL 52.202(1)(a) directs that "[a] county medical examiner or deputy county medical examiner shall investigate the cause and manner of death of an individual under each of the following circumstances: . . . The individual dies by violence." In light of the undisputed nature of Lewis's violent death, the medical examiner had a statutory responsibility to investigate the death, and MRE 803(8) authorized the admission of the medical examiner's autopsy report.

Thus, we conclude that, consistent with *Lewis*, the trial court properly admitted the autopsy report.[1] Furthermore, given application of the plain-error test, we find that any assumed plain error was not prejudicial or outcome determinative as mentioned above, nor can we conclude that Childs was actually innocent considering the strong evidence of guilt or that the assumed error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

B. PROSECUTOR'S CONDUCT

Childs also asserts that the prosecutor repeatedly and improperly sought to bolster the credibility of Neal Covington, the uncle of Clinton Lewis, during her closing and rebuttal arguments, and improperly denigrated defense counsel in the course of her rebuttal argument. Childs's counsel did not object during the prosecutor's closing and rebuttal arguments on the grounds he now raises on appeal, leaving this issue unpreserved.

As explained in *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated on other grounds in *Crawford*, 541 US at 64,

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.

[1] Childs offers a related suggestion that defense counsel was ineffective for failing to object to the admissibility of the autopsy report. Because the autopsy report was properly admitted, however, an objection was not necessary. *Lewis*, 287 Mich App at 364; *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

"We review claims of prosecutorial misconduct case by case . . . to determine whether the defendant received a fair and impartial trial." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We consider unpreserved claims of prosecutorial misconduct only to ascertain whether any plain error affected the defendant's substantial rights. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

1. VOUCHING FOR CREDIBILITY

Childs insists that on several instances during closing and rebuttal arguments the prosecutor improperly vouched for Covington's credibility. "A prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses' truthfulness. However, the prosecutor may argue from the facts that a witness should be believed." *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009) (internal quotation and citation omitted). "[A] prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

Our review of the challenged closing and rebuttal arguments reveals that at no point did the prosecutor ever suggest that she had some special knowledge of Covington's truthfulness. Instead, the prosecutor accurately characterized the content of Covington's testimony and how it was consistent with the accounts given by many of the other trial witnesses. Furthermore, the prosecutor repeatedly and correctly advised the jury that it had the prerogative to ascertain the truthfulness of Covington and the other witnesses, in part by considering their accounts in the context of all the evidence introduced at trial. See CJI2d 3.1 and 3.6. In sum, the prosecutor did nothing inappropriate in commenting on Covington's testimony.

2. DENIGRATION OF DEFENSE COUNSEL

Childs argues that improper characterizations of the defense appear in the following paragraphs of the prosecutor's rebuttal argument:

> The only issue became—'cause at the beginning, you know, you get into a case, you try to think okay, what's the defense. And they don't have to do anything, but they're going to have a theory as to what the defense is. And you can tell at the beginning their theory was going to be that it was the stepdad that did it. That was going to be their theory. And then as the witnesses kept coming and kept coming . . . and it became clear that all of the witnesses, including Nicole Thomas, said that Mr. Phelps was back here when he fired, he was back here in the middle of the street shooting up in the air, no way could have caused the kind of injury sustained by Clinton Lewis, which is from right to left and upward. Consistent with the testimony of the witnesses in this case, particularly Aunjrey Lewis. Consistent with the witnesses saying that he's facing this way, he's at the back of the car, he's facing, he looks up, ah shit and turns and . . . takes a bullet right here. Consistent with both Michael's testimony, consistent with both Aunjrey's testimony about how the shooting happened.

> *And you've got a bunch of red herrings out here*. You've got questions being spat at witnesses at a fast pace. Well, didn't he say, you know, he was facing you. Yeah, when? At some point he was facing this way and then he turned. The situation was so fluid, people were moving and it takes seconds for people to change positions, to get from one position to the next. *The human eye isn't that quick to capture it as best as the defense would like you to believe*. [Emphasis added.]

"A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *Watson*, 245 Mich App at 592. To the extent that Childs asserts that denigration appears in the first quoted paragraph of the prosecutor's rebuttal, we detect none. Instead, this paragraph reflects that the prosecutor simply and accurately referenced the trial testimony. Although Michigan courts do not look with favor on a prosecutor's description that the defense has offered "red herrings," the second paragraph quoted above comprises an appropriate reply to the closing arguments of Childs's and Thomas's trial counsel, which emphasized the varying accounts and discrepancies among the trial testimony of the witnesses, and urged that the discrepancies rendered the testimony of the prosecution witnesses unreliable. See *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007) (observing that although the prosecutor's "red herring" "comments might have suggested that defense counsel was trying to distract the jury from the truth, the comments were, in general, properly made in response to defense counsel's suggestion that the prosecutor failed to recognize evidence that was allegedly problematic to the prosecution's theory"); *Watson*, 245 Mich App at 593 (explaining that the prosecutor's rebuttal argument reference to "red herrings" did not rise to error requiring reversal because they occurred in the course of a prosecution response "to defense counsel's closing argument, in which defense counsel emphasized discrepancies between the various accounts of the events"). Additionally, even assuming some impropriety, any prejudicial effect was minimized or eliminated by the trial court's jury instruction that the attorneys' arguments did not constitute evidence and that the jury "should only accept things the lawyers say that are supported by the evidence or by your own common sense or general knowledge." *Unger*, 278 Mich at 237 (observing that "relatively brief" inappropriate comments by the prosecutor did not warrant reversal, especially in light of the trial court's instruction that counsels' arguments did not qualify as evidence).

In summary, no prosecutorial misconduct occurred.

C. LATE ENDORSEMENT OF A WITNESS

Childs next challenges the trial court's decision granting the prosecutor's motion to endorse Covington as a trial witness on the fourth day of trial. We review for an abuse of discretion a trial court's decision whether "to permit or deny the late endorsement of a witness." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008); see also *People v Herndon*, 246 Mich App 371, 402; 633 NW2d 376 (2001). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Yost*, 278 Mich App at 379.

"MCL 767.40a(4) permits a prosecutor to endorse a witness 'at any time upon leave of the court and for good cause shown or by stipulation of the parties.'" *Herndon*, 246 Mich App at

403, quoting MCL 767.40a(4). This Court has recognized that a purpose underlying MCL 767.40a is to afford "notice to the accused of potential witnesses[.]" *People v Callon*, 256 Mich App 312, 327; 662 NW2d 501 (2003). "[T]o establish that the trial court abused its discretion [in granting a late endorsement motion], [the] defendant must demonstrate that the court's ruling resulted in prejudice." *Id*. at 328.

The following colloquy took place on the fourth day of trial:

> *The Prosecutor*: There's been a lot of discussion during the course of this trial of a witness by the name of Neal Covington, the uncle. And Mr. Covington had not been interviewed and I did ask the officer-in-charge—yesterday Mr. Harper [Childs's defense counsel] said is Mr. Covington coming and I said he's not on the list. So, I had the officer go interview him. He did take a four page statement. And my understanding is he will be here today and I'm moving to endorse him.
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> *The Court*: Okay.
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> *Mr. Harper [Childs's counsel]*: It is late. We had no prior knowledge of his appearance or any statement that he might make, but I have been provided with one this morning.
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> * * *
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> *The Court*: Of course, whether late endorsement is allowed is a discretion [sic] of the Court, and you weigh out the circumstances, whether it's [a] surprise, is counsel being denied the proper notice. But I think it is quite clear from this record from the very beginning that person's name has been mentioned, he's included in the reports. I think we have a general idea of who and what he is and how he was involved with this. I don't think it is a big surprise. I am going to allow that.

The trial court did not select an outcome falling beyond the range of reasonable and principled outcomes when it granted the prosecutor's motion to permit Covington's testimony. The prosecutor endorsed as potential trial witnesses 12 of the multiple eyewitnesses to at least portions of the melee on Euclid Street that culminated in the shooting of Clinton Lewis. The prosecutor did not list Covington because he had not given a statement to the police. But many of the individuals involved in the altercation who testified during the first three days of trial referenced Covington's participation in the events. Childs's counsel did not dispute that he had inquired whether the prosecutor intended to call Covington to testify. The trial record demonstrating Covington's significant participation in the events and the importance of his testimony to giving the jury a fuller window into the circumstances surrounding the shooting amounted to good cause supporting the trial court's decision to grant the motion.

Concerning the purpose of MCL 767.40a to give the accused notice of potential witnesses, Childs does not dispute that multiple witness statements taken shortly after the August 31, 2009, shooting reference Covington. The record reflects that when the fourth day of trial began, the prosecutor provided Childs's counsel with a copy of the four-page statement that

Covington supplied to the police the evening before his testimony, that Childs's counsel had the opportunity to review Covington's statement during the testimony of two witnesses who were called before Covington testified, and that Childs's counsel never voiced a concern or need for more time to review or investigate Covington's statement. Furthermore, the record substantiates no unfair prejudice to Childs stemming from the trial court's allowance of Covington's testimony. *Callon*, 256 Mich App at 328. Covington's account of the altercations and shooting of Clinton Lewis added some details not present in the accounts of the previous trial witnesses, including that he saw Childs in possession of Covington's silver handgun. But unlike several of the prosecution witnesses who had already testified, Covington did not assert that he saw Childs shoot Clinton Lewis. We discern no lack of notice regarding Covington's potential testimony at trial and no suggestion of unfair prejudice stemming from his late endorsement as a trial witness.

In summary, the trial court did not abuse its discretion in granting the prosecutor's motion to endorse Covington as a witness.

D. ADMISSIBILITY OF 911 RECORDINGS

Childs lastly disputes the propriety of the trial court's admission into evidence of 911 audio recordings, which Childs alleges supplied no probative value and injected unfair prejudice. The decision whether to admit evidence rests within the trial court's sound discretion and "will be reversed only where there is an abuse of discretion." *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). An abuse of discretion exists when the trial court selects an outcome falling outside the range of reasonable and principled outcomes. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007).

Childs's counsel and the trial court placed on the record their positions concerning the admissibility of the 911 audio recordings:

> *Mr. Harper [Childs's counsel]*: The 911 tapes are unidentified as to who the speakers are in most of them. They are not confirmed by anyone who testified in the case as being the person who made the phone call. The prosecutor is arguing and has alleged that the sounds heard on the 911 tape are gunshots that are involved in this case and there's no way of substantiating that or confirming that as the speaker and location of the speaker is not known and what the sounds are could be anything.
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> * * *
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> *The Court*: Understood. But I think that when you listen to that, just for this record, each time that . . . a call comes into the 911 operator, there is a recorded voice that says the date and the time. And all of that information that is done, I suppose is done just electronically when they get the call so they know when it comes in, because their system is in the same time period and so forth as the time of the case here and the events of the case.
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> Additionally, I recognize that they're not identified. But I think that neither of them identified anybody, just simply giving circumstances that were occurring at the time.

> I don't know whether they could be excited utterance, but I think their relevancy has to do with indicating the events and what was going on that could certainly corroborate the testimony of persons as testified here.
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> Moreover, I don't think that there was anything that was done or said in any of those that causes any harm to either Defendant in any kind of way where there was something that was said that would identify them or anything of that nature. . . .

The content of the 911 audio recordings was not transcribed, neither a copy of the recordings nor a transcription of the calls appears in the record, and Childs has not furnished a copy of the recordings or a transcription of the calls with his brief on appeal. Accordingly, we accept the trial court's observations about the times and dates of the calls placing them around the time of the Euclid Street shootings, as well as the prosecutor's characterization that "the circumstances tied the call to this offense." Childs has not satisfied his appellate burden to "furnish[] the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated." *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Accepting that the calls recorded reports of events or sounds, including gunshots, that had a relationship to the Euclid Street shootings, the recordings possessed some tendency to make more likely the fact that the Euclid Street shootings did occur on the afternoon of August 31, 2009, a fact of consequence in this case. MRE 401. Because the recordings qualified as relevant evidence, they were admissible pursuant to MRE 402.

Childs complains that the recordings unfairly prejudiced him, given that they revealed "highly inflammatory" comments designed "to elicit an emotional response from the Jury." But Childs's offers no concrete or specific examples of purportedly inflammatory statements. In light of the trial court's findings that the recordings identified neither Childs nor Thomas and did not otherwise inject harm to Childs or Thomas prohibited under MRE 403, we conclude that the trial court selected an outcome within the range of reasonable and principled outcomes when it admitted the 911 recordings.

II. DOCKET NO. 297763

A. SUFFICIENCY OF THE EVIDENCE

Thomas initially challenges the sufficiency of the evidence supporting his conviction for assault with intent to commit murder. He contends that there was insufficient evidence of the intent to kill. We review de novo a challenge to the sufficiency of the evidence. *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004).

> When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial.

> Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. [*People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000) (internal quotations omitted).]

"It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

A conviction of assault with intent to commit murder, MCL 750.83, requires proof that the defendant committed "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010) (internal quotation omitted).

In *People v Drayton*, 168 Mich App 174, 176-177; 423 NW2d 606 (1988), this Court, quoting *Roberts v People*, 19 Mich 401, 415 (1870), observed:

> "By saying however, that the specific intent to murder or . . . the intent to kill must be proved, we do not intend to say it must be proved by direct, positive, or independent evidence; but as very properly remarked by my brother Campbell in *People v Scott*, 6 Mich [287 (1859)], the jury 'may draw the inference, as they draw all other inferences, from any facts in evidence which to their minds fairly prove its existence.' And in considering the question they may, and should take into consideration the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made."

The evidence showed that Thomas behaved insultingly toward Calvin Phelps, his next-door neighbor and Clinton Lewis's stepfather, on the afternoon of August 31, 2009, that Clinton Lewis became involved in a fight with Thomas during which Lewis knocked out one of Thomas's teeth, and that minutes later Thomas accompanied his brother, who had an AK-47 assault rifle, onto the porch of 638 East Euclid, where they repeatedly threatened Lewis with death. A short while later that afternoon, Lewis and his father attempted to drive away from the neighborhood, but Thomas attacked their car with a baseball bat and again fought Lewis until codefendant Childs, an acquaintance of Thomas, shot and killed Lewis. Thomas, Childs, and others returned to the Thomas residence at 644 East Euclid, followed moments later by upset neighbor Tavaras Montgomery, Michael Bracey, one of Lewis's brothers, and Covington, who broke a front window while on the porch of 644 East Euclid. As Bracey and Montgomery walked away from 644 East Euclid, Thomas took aim with a shotgun from an upstairs window of that house and fired once in the direction of Bracey and Montgomery, striking Montgomery in the upper chest and left leg. Viewed in the light most favorable to the prosecution, Thomas's continued exhibitions of violent behavior on the afternoon of August 31, 2009, his death threats, and his ultimate discharge of a shotgun at Bracey and Montgomery as they walked away from Thomas's house, which struck Montgomery's upper chest and leg, amply supported a reasonable jury's conclusion beyond a reasonable doubt that Thomas assaulted Montgomery while

specifically intending to kill him. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992) ("[t]he intentional discharge of a firearm at someone within range is an assault"); *Drayton*, 168 Mich App at 176-177.

B. EFFECTIVE ASSISTANCE OF COUNSEL

Thomas next raises four purported examples of his trial counsel's ineffective assistance. Thomas did not move for a new trial or an evidentiary hearing to address his ineffective assistance of counsel claims. Therefore, this Court limits its review to mistakes apparent on the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Whether a defendant has received the effective assistance of counsel comprises a mixed question of fact and constitutional law, which we review, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To establish the first component, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Solmonson*, 261 Mich App at 663. With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id*. at 663-664. A defense counsel possesses "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The defendant must overcome the strong presumptions that his "counsel's conduct falls within the wide range of professional assistance" and that his counsel's actions represented sound trial strategy. *Strickland*, 466 US at 689. This Court may not "substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (internal quotation omitted).

1. SEVERANCE

Thomas initially argues that his trial counsel's failure to move to sever the charges against him and Childs amounted to ineffective assistance of counsel. The Michigan Court Rules envision that "[a]n information or indictment . . . . may charge two or more defendants with two or more offenses when . . . the offenses are related as defined in MCR 6.120(B)." MCR 6.121(A)(2). The referenced subrule, MCR 6.120(B)(1), sets forth the following:

> Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
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> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
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> (c) a series of acts constituting parts of a single scheme or plan.

According to MCR 6.121(C), "On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." MCR 6.121(D) provides that on a party's motion, "the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants."

The record demonstrates that the charges against Childs and Thomas arose from "a series of connected acts." MCR 6.120(B)(1)(b). Thomas had a firm connection to both shootings, which occurred in close physical and temporal proximity—a discrete area of Euclid Street within a couple of minutes of one another. Thomas set in motion the series of events leading to the shooting of Clinton Lewis, and shortly thereafter, the shooting of Montgomery. Thomas started the disagreement with Lewis, leading to the one-on-one fight. Thomas then escalated the dispute by alighting onto the front porch of 638 East Euclid with his brother, who possessed an AK-47. Thomas and his family and friends solicited reinforcements, as did Lewis's family. When Lewis and his father tried to leave Euclid Street, Thomas, who carried a baseball bat, and several of his group prevented them from leaving and initiated a large fight in the street. Childs, an acquaintance of Thomas, who was recruited to the scene to assist Thomas and his group, walked into the street and shot Lewis. Scant minutes later, Thomas, Childs, and others sought refuge inside 644 East Euclid, Lewis's brother, uncle, and Montgomery broke windows at 644 East Euclid, and as Lewis's brother and Montgomery walked away from 644 East Euclid, Thomas shot Montgomery.

In light of the interrelationship between the two shootings, to justify severance Thomas had to make "a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." MCR 6.121(C). "There is a strong policy favoring joint trials in the interest of justice, judicial economy, and administration, and a defendant does not have an absolute right to a separate trial." *People v Etheridge*, 196 Mich App 43, 52-53; 492 NW2d 490 (1992). "Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994).

> Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be "mutually exclusive" or "irreconcilable." Moreover, incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice. The tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other. [*Id*. at 349 (internal quotations and citations omitted).]

After reviewing the record, we have located nothing giving rise to any likelihood that the joint proceedings adversely impacted Thomas's substantial rights. Childs and Thomas did not pursue mutually exclusive, irreconcilable, or even inconsistent defenses. Neither Childs's counsel nor Thomas's counsel pointed to the other codefendant as the party responsible for the shootings. Rather the defense of each codefendant endeavored to highlight inconsistencies in the accounts of the many witnesses and argue that the prosecutor had not satisfied her burden of

proving guilt beyond a reasonable doubt. Furthermore, although Thomas notes on appeal several facets of the joint trial that allegedly prejudiced him, he fails to illustrate prejudice to his substantial rights. Thomas mentions a statement of Childs that was read into the record at trial, but Childs's statement contained no reference to Thomas. Thomas also notes the admission of "hearsay 911 tapes . . . [that] did not pertain to Montgomery's assault," but as we have already concluded, the probative recordings did not inject any danger of unfair prejudice. Thomas maintains that the prosecutor had the luxury of portraying him as "a violent and bad man" by introducing evidence of the "two earlier fights . . . [that] had no probative value as to . . . [Thomas's] action when his home was under siege," but this position ignores the connected nature of the charged crimes. Thomas also offers multiple conclusory and unsubstantiated averments of prejudice, without any citation to the record.

In conclusion, the charges against Childs and Thomas arose from a series of connected acts, and Thomas has not shown that the joint proceedings prejudiced his substantial rights. Therefore, Thomas's counsel was not ineffective for failing to file a motion to sever the charges against Childs and Thomas. *Ericksen*, 288 Mich App at 201.

2. FAILURE TO RAISE SELF-DEFENSE

Thomas castigates his trial counsel for not pursuing a self-defense theory at trial. Under both the common law and Michigan's Self-Defense Act, MCL 780.971 *et seq*., a defendant may legally claim self-defense if he had an honest and reasonable belief of an imminent danger of death or serious bodily harm. MCL 780.972(1)(a); *People v Heflin*, 434 Mich 482, 502-503; 456 NW2d 10 (1990); *People v Conyer*, 281 Mich App 526, 529-530; 762 NW2d 198 (2008); *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995); *People v Green*, 113 Mich App 699, 703-704; 318 NW2d 547 (1982). The testimony surrounding Thomas's shooting of Montgomery reflected that Montgomery and Michael Bracey had abandoned their violent misbehavior on the porch of 644 East Euclid and were returning to 638 East Euclid when Thomas fired at them, and there was no evidence of an ongoing assault of or threat to Thomas or his family when Thomas shot Montgomery from a second story window. Consequently, Thomas's trial counsel was not ineffective for neglecting to pursue a self-defense theory. *Ericksen*, 288 Mich App at 201.

3. FAILURE TO OBJECT TO THE PROSECUTOR'S CONDUCT

Thomas further contends that his counsel inexcusably failed to object to several instances of prosecutorial misconduct. As discussed in further detail in part II(C), *infra*, the prosecutor made no improper argument. Accordingly, Thomas's counsel need not have lodged groundless objections to the prosecutorial arguments. *Ericksen*, 288 Mich App at 201.

4. TRANSFERRED INTENT INSTRUCTION

Thomas suggests that an "erroneous instruction on transferred intent diminished the Prosecutor's burden of proof for the assault with intent to murder charge. Anybody will do, it seems the act of discharging a weapon alone establishes the elements of the crime." The thrust of Thomas's instructional argument is not clear, and he offers no authority regarding transferred intent in support of his assertion. Moreover, the record reflects that the trial court instructed the

jury on the elements of assault with intent to commit murder in accordance with CJI2d 17.3, and twice advised the jury in a manner consistent with CJI2d 17.17 that if Thomas "intended to assault one person but by mistake or accident assaulted another person, the crime is the same as if the first person had actually been assaulted." The trial court's instructions adequately explained the concept of transferred intent. See *People v Plummer*, 229 Mich App 293, 304 n 2, 305-306; 581 NW2d 753 (1998). Because the trial court correctly instructed the jury, Thomas's counsel was not ineffective for neglecting to raise a meritless objection to the transferred intent instruction. *Ericksen*, 288 Mich App at 201.

C. PROSECUTOR'S CONDUCT

Thomas avers that during closing and rebuttal arguments, the prosecutor improperly vouched for the credibility of Covington and Aunjrey Lewis, denigrated defense counsel, and demonized Thomas. There were no objections to the prosecutor's closing and rebuttal arguments. Therefore, we review these unpreserved assertions of prosecutorial misconduct for plain error that affected Thomas's substantial rights. *Unger*, 278 Mich App at 235.

1. VOUCHING FOR CREDIBILITY

Thomas's appellate contention that the prosecutor improperly bolstered the credibility of Covington rests almost entirely on the passages of the prosecutor's closing and rebuttal arguments challenged by Childs and addressed in part I(B)(1), *supra*, of this opinion. As we earlier explained, a review of the challenged closing and rebuttal argument excerpts reveals that at no point did the prosecutor ever suggest that she had "some special knowledge of . . . [Covington's] truthfulness." *Seals*, 285 Mich App at 22. Instead, the prosecutor accurately characterized the content of Covington's testimony and how it was consistent with the accounts of many other trial witnesses. Furthermore, the prosecutor repeatedly and correctly advised the jury that it had the prerogative to ascertain the truthfulness of Covington and the other witnesses, in part by considering their accounts in the context of all the evidence introduced at trial. See CJI2d 3.1 and 3.6. To the extent that Thomas also criticizes the prosecutor's representation that "her star witness could not have been the shooter since Morris Larry had him in a head lock," this argument accurately describes the testimony of Morris Larry and Andrew Larry, who entered the fight on behalf of Thomas, and Covington concerning his position at the time of the shooting. *Schutte*, 240 Mich App at 721.

Similarly, the prosecutor's summary of Aunjrey Lewis's trial testimony, including the purportedly improper comment, "I submit to you that little . . . Aunjrey, was probably the one that had the best vantage point about what was going on, how his brother died," accurately described Lewis's testimony. Lewis recalled that he had stood in a position close to Clinton Lewis's father's car during the fight and shooting of Clinton Lewis and did not participate in the altercation, but merely watched the events.

2. DENIGRATION OF DEFENSE COUNSEL

Thomas criticizes as improper denigration the following emphasized portion of the prosecutor's rebuttal argument:

> Now, [Thomas], you think listening to the defense of Nico Thomas in here that . . . Montgomery was never shot, that there was no shotgun fired, that that birdshot in his leg just magically appeared. Well, you didn't hear a shot after that, did you? Did you hear a shot? Were they all close together? Did you hear a shot? You would think it didn't happen. That we're just making it up that he was shot. That the officers there at the scene said, yep, he was wounded, I saw blood on his leg and chest area, that he was transported to the hospital in an ambulance, they're just making that up because we want to put a charge on Nico, I guess.
>
> *That's all I heard in this case as far as a defense of Nico Thomas is I didn't prove this case beyond all doubt. Remember when Mr. Brown [Thomas's counsel] stood over me, yeah, yeah, I don't mean it—reasonable doubt. He's dancing, bopping like Muhammad Ali, just kind of jabbing and doing whatever he can to maybe have one of you bite at whatever red herrings he's throwing out. That's what he's doing. Does he think you don't have common sense? Does he think that this injury just magically appeared?* [Emphasis added.]

As we observed in our discussion in part I(B)(2), *supra*, although Michigan courts do not look with favor on a prosecutor's description that the defense has offered "red herrings," the second paragraph quoted above comprises an appropriate reply to the closing arguments of Thomas's trial counsel, which emphasized the varying accounts and discrepancies among the trial testimony of the witnesses and urged that the discrepancies rendered the testimony of the prosecution witnesses unreliable. *Dobek*, 274 Mich App at 67; *Watson*, 245 Mich App at 593. Additionally, even assuming some impropriety, any prejudicial effect was eliminated or minimized by the trial court's jury instruction that the attorneys' arguments did not constitute evidence, and that the jury "should only accept things the lawyers say that are supported by the evidence or by your own common sense or general knowledge." *Unger*, 278 Mich App at 237.

3. DENIGRATION OF DEFENDANT THOMAS

With respect to Thomas's complaints about the prosecutor's demonization of him, we find that the prosecutor's closing argument amounted to proper commentary on the basis of ample evidence admitted at trial establishing Thomas's integral role in his and his brother's attack on 638 East Euclid before the shootings and the fights leading up to the two charged shootings. *Schutte*, 240 Mich App at 721. While Thomas does not complain that the prosecutor appealed to jury sympathy, the isolated references to family members' anguish does not equate to a forbidden invocation of jury sympathy for the victims. See *Watson*, 245 Mich App at 591; see also *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994).

D. CUMULATIVE ERROR

Thomas lastly insists that the cumulative effect of the errors in the proceedings deprived him of his due process right to a fair trial. US Const, Ams V and XIV; Const 1963, art 1, § 17.

Because Thomas has not demonstrated the existence of any actual errors, he cannot show that the cumulative effect of any errors adversely impacted his right to a fair trial. *LeBlanc*, 465 Mich at 591-592 n 12.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Christopher M. Murray